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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

JASON SHAPIRO and ANDREW
FREITAS, on behalf of themselves and
those similarly situated,

Plaintiffs,

v.

FORD MOTOR COMPANY,

Defendant.

Case No. 2:15-cv-09200-AB-MRWx

CLASS ACTION

**FORD MOTOR COMPANY'S
REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF ITS
MOTION TO DISMISS AND/OR
STRIKE ALLEGATIONS IN
COMPLAINT**

Hearing Date: June 27, 2016
Time: 10:00 a.m.
Place: 4
Judge: Hon. Andre Birotte, Jr.

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE THAT on June 27, 2016, at 10:00 a.m., or as soon
3 thereafter as the matter may be heard, in Courtroom 4 of the above-captioned Court,
4 located at 312 North Spring Street, Los Angeles, California, Defendant Ford Motor
5 Company ("Ford") will request that the Court take judicial notice under Rule 201 of
6 the Federal Rules of Evidence of the following documents in support of Ford's
7 Motion to Dismiss and/or Strike Allegations in Complaint:

- 8 1. The 2013 Ford Explorer Owner Manual, the relevant excerpts of which
9 are attached as Exhibit 1 to the Declaration of Michael Reynolds (the
10 "Reynolds Declaration");
- 11 2. The 2013 Ford Focus Owner Manual, the relevant excerpts of which are
12 attached as Exhibit 2 to the Reynolds Declaration;
- 13 3. The archived Ford Explorer Brochures & Guides webpage as it appeared
14 on August 16, 2013, available on the Internet Archive at
15 [https://web.archive.org/web/20130816234540/http://www.ford.com/suvs/
16 explorer/2013/brochures/](https://web.archive.org/web/20130816234540/http://www.ford.com/suvs/explorer/2013/brochures/), attached as Exhibit 3 to the Reynolds
17 Declaration;
- 18 4. The archived Ford Support webpage as it appeared on October 15, 2012,
19 available on the Internet Archive at [https://web.archive.org/web/
20 20121015043112/http://support.ford.com/](https://web.archive.org/web/20121015043112/http://support.ford.com/), attached as Exhibit 4 to the
21 Reynolds Declaration;
- 22 5. The archived Ford Owner Manuals webpage as it appeared on October 11,
23 2012, available on the Internet Archive at [https://web.archive.org/web/
24 20121011193023/https://owner.ford.com/servlet/ContentServer?
25 pagename=Owner/Page/OwnerGuidePageVehicleLookup&
26 BackToLogin=Owner/Page/OwnerGuidePage&ord=23587283](https://web.archive.org/web/20121011193023/https://owner.ford.com/servlet/ContentServer?pagename=Owner/Page/OwnerGuidePageVehicleLookup&BackToLogin=Owner/Page/OwnerGuidePage&ord=23587283), attached
27 as Exhibit 5 to the Reynolds Declaration; and
28

6. The complaint previously filed by Plaintiff Jason Shapiro in *Draeger v. Toyota Motor Corp.*, No. 2:15-CV-06491-AB-MRW (C.D. Cal. Aug. 26, 2015) (“*Draeger*”), Docket No. 1, attached as Exhibit 6 to the Reynolds Declaration.

Under Federal Rule of Evidence 201, “the court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). On a Rule 12(b)(6) motion, the court may consider documents that are the proper subject of judicial notice. *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012). This rule serves the critical policy interest of “preventing plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based.” *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1131 (C.D. Cal. 2007) (citation omitted).

I. ARGUMENT

The Court should take judicial notice of the owner manuals, archived Ford webpages, and Mr. Shapiro’s complaint in *Draeger* because: (1) the owner manuals and webpages are incorporated by reference in Plaintiffs’ Complaint, which refers to and relies on “pre-sale vehicle documents” and “Ford Group’s websites”; (2) the owner manuals and Ford webpages are accessible as they appeared when Plaintiffs purchased and leased their vehicles on the Internet Archive website, a source whose accuracy cannot be reasonably disputed; and (3) Mr. Shapiro’s complaint in *Draeger* is a matter of public record.

A. The Owner Manuals, Available to Plaintiffs on Ford’s Website Before Purchase, Are Incorporated By Reference in the Complaint

The Court may take judicial notice of the owner manuals for Plaintiffs’ vehicles and the archived webpages as they appeared when Plaintiffs purchased and leased their vehicles because these documents are incorporated by reference in Plaintiffs’ Complaint. Under the “incorporation by reference” doctrine, the Court

1 may take judicial notice of documents “whose contents are alleged in a complaint
2 and whose authenticity no party questions, but which are not physically attached to
3 the [plaintiff’s] pleading.” *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)
4 (citations omitted). The document need not be expressly named in the complaint—
5 judicial notice is appropriate if the “plaintiff’s claim depends on the contents of the
6 document, the defendant attaches the document to its motion to dismiss, and the
7 parties do not dispute the authenticity of the document, even though the plaintiff
8 does not explicitly allege the contents of that document in the complaint.” *Zella*,
9 529 F. Supp. 2d at 1131 (citing *Knievel*, 393 F.3d at 1076).

10 Plaintiffs allege throughout the Complaint that “Ford Group . . . failed to
11 disclose to Plaintiffs and/or concealed material information regarding the Defect
12 from Plaintiffs” (*see* Compl. ¶¶ 153(a), 177, 181, 195, 205, 221), specifically
13 alleging that “[s]uch information is not disclosed in any *pre-sale documents*,
14 displays, advertisements, *on Ford Group’s websites*, or on any other *pre-sale*
15 *communication*” (*id.* ¶ 153(d)) (emphasis added). The Complaint asserts that
16 Plaintiffs’ Counsel “collected and analyzed relevant pre-sale vehicle documents for
17 each of the Affected Vehicles, and there are *no warnings* whatsoever in the
18 Affected Automobiles’ pre-sale materials to alert consumers of the deadly carbon
19 monoxide risks associated with the Defect” (*id.* ¶ 27 (emphasis in original)), and
20 that “Plaintiffs are aware of no document, communication, or other place or thing,
21 in which Ford Group disclosed the truth about the Defect in its Affected Vehicles to
22 consumers” (*id.* ¶ 153(d)).

23 The owner manuals for Plaintiffs’ vehicles and the archived webpages on
24 which they were available are “pre-sale documents,” “Ford Group’s websites,”
25 “pre-sale communication[s],” and “pre-sale vehicle documents” on which Plaintiffs’
26 claims necessarily rely. The owner manuals were published and available on Ford’s
27 website before Plaintiffs’ purchases or leases (as demonstrated by the archived
28

webpages) and are also located within the vehicles at Ford dealerships. Plaintiffs’ fraudulent omission claims—in which they claim that Ford never disclosed to consumers the lack of an automatic engine shut-off feature—necessarily rely on all the documents Ford made available to consumers before purchase or lease, including the owner manuals and Ford webpages. Thus, the manuals and webpages are judicially noticeable under the incorporation by reference doctrine. *See Zella*, 529 F. Supp. 2d at 1131.

Indeed, when Mr. Shapiro filed his original complaint against Ford in *Draeger v. Toyota Motor Corp.*, No. 2:15-CV-06491-AB-MRW (C.D. Cal. Aug. 26, 2015), he specifically alleged that his counsel had analyzed the owner manuals for the subject vehicles for warnings about the alleged Defect. (*See Reynolds Decl. Ex. 5 (Draeger v. Toyota Motor Corp.*, No. 2:15-CV-06491-AB-MRW (C.D. Cal. Aug. 26, 2015), Dkt. No. 1 ¶ 1, n.1, ¶ 25.) After Ford filed its motion to dismiss in *Draeger*, pointing out that the owner manual for Mr. Shapiro’s vehicle specifically disclosed the lack of an automatic engine shut-off feature, Mr. Shapiro filed his “First Amended Class Action Complaint” (Compl. at 1), and referred instead to “sales brochures” and “pre-sale vehicle documents” rather than the “vehicle manuals” he had previously professed to have read:

<i>Draeger</i> Complaint	Complaint
Paragraph 1, footnote 1: “Exhibit 1 is the result of hundreds of hours of research and was compiled based on analysis of thousands of pages of automotive manuals and sales brochures for each of the more than 1,500 models, submodels, and trim levels listed in Exhibit 1. The brochures and sales manuals confirm that: 1) each make representations of safety, and 2) each make no mention of the lack of Auto-Off safety defect as defined and described herein” (emphasis added).	Paragraph 1, footnote 1: “Exhibit 1 is the result of hundreds of hours of research and was compiled based on analysis of thousands of pages of sales brochures for each of the more than 1,500 models, submodels, and trim levels listed in Exhibit 1. The sales brochures confirm that each make no mention of the lack of Auto-Off as defined and described herein.”

Paragraph 27: “[Defendants] have failed to recall, warn of the Defect in their *auto manuals* or sales brochures, or otherwise rectify Affected Vehicles and institute Auto-Off . . .” (emphasis added).

Paragraph 29: “Ford Group has failed to rectify or warn of the Defect in their sales brochures *or any other pre-sale materials*, or otherwise rectify Affected Vehicles and institute Auto-Off . . .” (emphasis added).

The owner manuals are thus incorporated by reference in Plaintiffs’ Complaint whether referred to as “pre-sale vehicle documents” (as they are named in the Complaint) or more explicitly as “automotive manuals” (as they are named in the *Draeger* Complaint). *See Zella*, 529 F. Supp. 2d at 1131 (judicial notice is intended to prevent “plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based”); *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 877 (1992) (under California law, “courts may properly take judicial notice of a party’s earlier pleadings and positions as well as established facts from both the same case *and other cases* (emphasis in original)); *Hills Transp. Co. v. Southwest Forest Industries, Inc.*, 266 Cal. App. 2d 702, 713 (1968) (“A pleader may not attempt to breathe life into a complaint by omitting relevant facts which made his previous complaint defective.”). Because they are incorporated by reference in Plaintiffs’ Complaint, the Court should take judicial notice of the owner manuals and archived Ford webpages.

B. The Owner Manuals and Ford Webpages Are Easily and Readily Accessible and Cannot be Reasonably Disputed

The Court may also take judicial notice of the owner manuals and the archived webpages as facts that can be accurately and readily determined from a source—the Internet Archive and current webpages—whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201; *Erickson v. Nebraska Mach. Co.*, 2015 WL 4089849, at *1 n.1 (N.D. Cal. July 6, 2015) (taking judicial notice of contents of archived webpages on the Internet Archive “Wayback Machine”).

Publicly available information published on a website is judicially noticeable

as matters that can be “accurately and easily determined” from an accurate source under Rule 201. *Reese v. Malone*, 747 F.3d 557, 570 (9th Cir. 2014) (taking judicial notice of information posted on government website); *Matthews v. Nat’l Football League Mgmt. Council*, 688 F.3d 1107, 1113 (9th Cir. 2012) (taking judicial notice of information posted on defendant’s website). And the contents of a website as it appeared on a certain date, as shown on the Internet Archive (www.archive.org, also known as the “Wayback Machine”), is judicially noticeable. *Wallack v. Idexx Labs., Inc.*, 2015 WL 5943844, at *16 (S.D. Cal. Oct. 13, 2015) (taking judicial notice of an archived webpage on the Internet Archive); *Erickson v. Nebraska Mach. Co.*, 2015 WL 4089849, at *1 n.1 (N.D. Cal. July 6, 2015) (same); *Tobinick v. Novella*, 2015 WL 1526196, at *2 ¶ 12 (S.D. Fla. Apr. 2, 2015) (same); *Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *1 n.1 (N.D. Cal. June 25, 2014) (same).

The Internet Archive is a database that continuously records and archives websites as they appeared on certain dates. As explained by the federal district court in the District of Delaware:

[The Internet Archive’s] digital database is equivalent to a paper library, but is filled with digital media like websites instead of books Internet Archive’s database provides users with the ability to study websites that may have been changed or no longer exist. The chronological records are compiled by routinely taking screenshots of websites as they exist on various days. Internet Archive collects images through a process called crawling. A crawler or robot is an automated program that scours the Internet and takes pictures of every web page that it is instructed to visit Any person with a web browser can search Internet Archive’s database of archived images. Searching the database is accomplished via the Wayback Machine, which Internet Archive provides on its website The Wayback Machine only provides a window into the past where users can see what a website looked like on a specific date.

Market-Alerts Pty., Ltd. v. Bloomberg Fin. L.P., 922 F. Supp. 2d 486, 494 (D. Del. 2013). “[A]s a resource the accuracy of which cannot reasonable be questioned, the

Internet Archive has been found to be an acceptable source for the taking of judicial notice.” *Pond Guy, Inc. v. Aquascape Designs, Inc.*, 2014 WL 2863871, at *4 (E.D. Mich. June 24, 2014).

The Plaintiffs’ owner manuals are accessible on Ford’s current website,¹ and thus their contents cannot reasonably be questioned. *See Matthews*, 688 F.3d at 1113. The owner manuals were also accessible on Ford’s website before Plaintiffs obtained their vehicles in 2012 and 2013, a fact that can be easily and readily determined from the Internet Archive.² The Court should therefore take judicial notice of the contents of Ford’s website, including the relevant owner manuals and the archived webpages from the Internet Archive.

C. The Plaintiffs’ Original Complaint is Part of the Public Record

Finally, Mr. Shapiro’s prior complaint is a matter of public record and therefore should be judicially noticed. *See Schweitzer v. Scott*, 469 F. Supp. 1017, 1020 (C.D. Cal. 1979); *Draeger v. Toyota Motor Corp.*, No. 2:15-CV-06491-AB-MRW (C.D. Cal. Aug. 26, 2015), Dkt. No. 1.

II. CONCLUSION

For the foregoing reasons, the Court should take judicial notice of the owner manuals, archived webpages, and the complaint in *Draeger*.

¹ Owner Manuals, FORD (Feb. 21, 2016, 3:44:00 PM), <https://owner.ford.com/tools/account/how-tos/owner-manuals-search-results.html>.

² *See* 2013 Explorer Brochures & Guides, FORD (Aug. 16, 2013), <https://web.archive.org/web/20130816234540/http://www.ford.com/suvs/explorer/2013/brochures/>; Ford Ownership Tools, FORD, (Oct. 15, 2012) <https://web.archive.org/web/20121015043112/http://support.ford.com/>; Ford Owner Manuals for Ford Vehicles, Ford, (Oct. 11, 2012) <https://web.archive.org/web/20121011193023/https://owner.ford.com/servlet/ContentServer?pagename=Owner/Page/OwnerGuidePageVehicleLookup&BackToLogin=Owner/Page/OwnerGuidePage&ord=23587283>.

1 Dated: February 22, 2016

Respectfully submitted,

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5 Randall W. Edwards
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7 Ford Motor Company
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